U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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PUBLIC COPY

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: JUL 11 2006

SRC 05 170 51459

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner had not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of job offer.
> >
> > > (i) Subject to clause (ii), the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The Form I-140 petition was filed on May 26, 2005. Part 2 of the petition form lists different petition types, including "An alien of extraordinary ability" and "An alien applying for a National Interest Waiver (who **IS** a member of the professions holding an advanced degree or an alien of exceptional ability)." Box "i" beside the latter category was checked. The petition was accompanied by a letter from the petitioner, dated May 3, 2005, stating: "This letter is written in support of the Petition for Immigrant Worker, as an alien of extraordinary ability in athletics, in the field of Paso Fino Horse Rider and Trainer."

On June 13, 2005, the director issued a Request for Evidence (RFE) stating: "Your Form I-140, Immigrant Petition for Alien Worker, indicates that you are filing as an alien applying for a National Interest Waiver (who is a member of the professions holding an advanced degree or an alien of exceptional ability)." The petitioner was instructed to submit evidence relating to the eligibility factors for a national interest waiver as set forth in *Matter of New York State Dept. of Transportation*, 22 I&N Dec. 215 (Comm. 1998).

The RFE further stated:

> It must be noted that the supporting letter from Charlotte Valley Farms indicates the letter is written in support of the petition, as an alien of extraordinary ability.

* * *

If you are filing as an alien of extraordinary ability, you may amend your petition and submit copies of published material relating to the beneficiary and copies of awards received by the beneficiary.

If you are seeking a National Interest Waiver, please submit evidence as mentioned above in precedent decision cited above.

In response, the petitioner submitted an August 23, 2005 letter prepared by counsel stating: "We write in response to your request for evidence dated June 13, 2005, with a Call Up Date of September 5, 2005. To further clarify, we are seeking to qualify the alien under Section 203(b)(2) as an alien with Exceptional Ability." The petitioner's submission did not include an amended copy of the Form I-140 petition.

On October 24, 2005, the director denied the petition, stating that the petitioner failed to address the eligibility factors enumerated in *Matter of New York State Dept. of Transportation*. The director found that the beneficiary was "not eligible for classification as an alien of exceptional ability who is applying for a National Interest Waiver pursuant to the provisions of section 203(b)(2) of the Act." We find that the director properly adjudicated this petition under the classification requested on the Form I-140 petition and in the August 23, 2005 response letter prepared by counsel.

On November 23, 2005, the petitioner filed both an appeal and a motion to reopen the director's decision. The motion to reopen included an amended Form I-140 petition requesting classification as an alien of extraordinary ability. The motion to reopen was accompanied by arguments and evidence pertaining to the beneficiary's eligibility pursuant to section 203(b)(1)(A) of the Act.

On January 24, 2006, the director dismissed the motion stating: "The petitioner clarified that they were seeking classification pursuant to section 203(b)(2) of the Act as an alien of exceptional ability; accordingly, the motion does not establish that the decision was wrong based on the evidence of record as the time the decision was made." We concur with the director's finding.

On appeal, counsel states that the petition was denied for a "classification not requested due to administrative error."

Neither the petitioner's appellate submission nor the motion to reopen address the beneficiary's eligibility under section 203(b)(2) of the Act.

Rather than challenging the findings cited in the director's October 24, 2005 decision, counsel requests that the beneficiary be considered for classification as an alien of extraordinary ability. The petitioner's failure to properly identify the classification sought, however, does not allow it the opportunity to now change classifications at the appellate stage. If the petitioner seeks to classify the beneficiary as an alien of extraordinary pursuant to section 203(b)(1)(A) of the Act, then it should file a separate I-140 petition requesting such classification. Counsel has cited no statute, regulation, or standing precedent that that permits a petitioner to change the classification of a petition once a decision has been rendered. Consequently, discussion in this matter may relate only to the petitioner's eligibility pursuant to section 203(b)(2) of the Act.

The petitioner's Form I-290B, Notice of Appeal to the AAO, requested "90 days to submit a brief and/or evidence to the AAO." The appeal was filed on November 23, 2005. The record, however, includes no documentation indicating that an appellate brief or evidence was submitted by the petitioner during the 90 day period subsequent to that date.

On May 9, 2006, the AAO received a facsimile stating that counsel is no longer in private practice and that she "did file additional evidence at the time the Form I-290B was submitted to the Texas Service Center."[1]

In this matter, the arguments and evidence presented by the petitioner do not address the beneficiary's eligibility pursuant to section 203(b)(2) of the Act. As stated in 8 C.F.R. § 103.3(a)(1)(v), an appeal shall be summarily dismissed if the party concerned fails to identify specifically any erroneous conclusion of law or statement of fact for the appeal. Here, the petitioner has not specifically challenged the director's findings, nor submitted any additional evidence relevant to the grounds for denial. The appeal must therefore be summarily dismissed.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.

[1] The "additional evidence" mentioned in this facsimile refers to the documentation accompanying the petitioner's November 23, 2005 motion to reopen, also filed using the Form I-290B. As previously noted, this documentation did not address the beneficiary's eligibility pursuant to section 203(b)(2) of the Act.